PennState Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 92
Issue 4 *Dickinson Law Review - Volume 92, 1987-1988*

6-1-1988

Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility

Kenneth J. Wilbur

Follow this and additional works at: https://ideas.dickinsonlaw.psu.edu/dlra

Recommended Citation

Kenneth J. Wilbur, *Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility*, 92 DICK. L. REV. 777 (1988).
Available at: https://ideas.dickinsonlaw.psu.edu/dlra/vol92/iss4/3

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility

Kenneth J. Wilbur*

I. Introduction

In recent years, the legal profession has witnessed an explosion of litigation and scholarly discussion concerning the cause of action of wrongful discharge. From the initial rumblings of a few scattered opinions,[1] wrongful discharge, in both its contract and tort variations,[2] has erupted into the field of employment law as an expanding exception to the employment at will doctrine.[3] This doctrine has given such employees a right not to be fired when their discharge violates an implied term of the employment contract or is contrary to an established principle of public policy. Although the law concerning wrongful discharge is still in its infancy, it would be difficult to find a legal journal that has not published at least one article on the subject,[4] a law student who has not researched the issue as part of a moot court exercise or summer associate assignment,[5] or an area of employment at will that has not been the subject of a wrongful dis-

* Law secretary to the Honorable Alan B. Handler, Associate Justice, New Jersey Supreme Court. J.D., 1987, University of Pennsylvania Law School. I would like to thank Professor Clyde W. Summers and the Honorable Edmund B. Spaeth Jr., Senior Fellow at the University of Pennsylvania Law School for their advice in preparing this Article.

1. *See, e.g.*, Petermann v. Teamsters Local 369, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (discharge for refusing to commit perjury jeopardized public policy in favor of honest testimony and thus was an abuse of employer's contractual rights); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (absolute right of discharge threatens public policy of improved labor relations; discharge of employee for refusing sexual advances of superior was in bad faith and amounted to breach of contract); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1974) (all employment contracts contain an implied covenant of good faith which limits the employer's right to discharge).

2. *See, e.g.*, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (discussing various theories of tort and contract recovery).

3. Under the employment at will doctrine, an employer does not have to justify his discharge of an employee. *See* Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 482 (1976).

4. *See* Greenbaum, *Toward A Common Law of Employment Discrimination*, 58 TEMPLE L.Q. 65, 65-66 n.4 (1985) (surveying some of the recent scholarly writings on wrongful discharge).

5. The University of Pennsylvania first year legal writing program has included a wrongful discharge exercise each of the past three years. *See also* S. TUROW, ONE L 29-30 (1978) (describing a wrongful discharge first year assignment at Harvard Law School in 1975).

charge suit.[6]

One part of the private sector at will employment market — the legal profession — has so far remained miraculously untouched by the fallout of this explosion of litigation. The paucity of cases involving legal employees is in some ways surprising. One would expect that lawyers, who are frequently blamed for the litigious nature of American society, would be especially zealous in seeking the aid of the courts to protect their employment rights. Experience, however, has shown that members of other professions are more likely to sue their employers when discharged for refusing to perform acts which they believe to be prohibited by professional codes of ethics.[7] To date, however, there does not appear to be a single reported decision in which a private sector attorney has sued his firm or corporate employer claiming to have been discharged for refusing to violate the Model Code of Professional Responsibility or the Model Rules of Professional Conduct.[8] This Article will explore the legal foundations of such a lawsuit.[9]

This Article proposes that courts in jurisdictions which have adopted the Model Code of Professional Responsibility[10] develop a cause of action for wrongful discharge which would prohibit a legal employer[11] from firing a lawyer for refusal to perform an act which the lawyer reasonably believes would violate the Code of Professional

6. *See, e.g., Pugh*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (vice-president of a confections company); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980) (doctor involved in drug research); Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (insurance company claims manager).

7. *See, e.g., Pierce*, 84 N.J. 58, 417 A.2d 505; Wood v. Upjohn Co., No. 6093-1-II, slip op. (Wash. App. Sept. 4, 1984) (doctors); Warthen v. Toms River Community Memorial Hosp., 199 N.J. Super. 18, 488 A.2d 229 (App. Div. 1985) (nurses); Kalman v. Grand Union Co., 183 N.J. Super. 153, 443 A.2d 728 (App. Div. 1982) (pharmacists).

8. In 1984, a state industrial appeals judge successfully brought an action challenging his suspension for refusing to violate the Code's provisions regarding the unauthorized practice of law by allowing lay representatives to argue before the appeals board. Lowry v. Industrial Insurance Appeals Board, 102 Wash. 2d 58, 684 P.2d 678 (1984). Also in 1984, a Los Angeles Superior Court jury awarded $250,000 to a staff attorney of an insurance company who was discharged for failing to obey orders not to disclose certain settlement offers to policyholders. *See* Riseley v. Maryland Casualty Co., described in Townley & Updike, *Personnel Practices Newsletter*, Jan. 1985.

9. Although such speculation is beyond the scope of this Article, two reasons why such suits are rare suggest themselves. First, law firms often are retained for their ability to keep their clients out of court and can be expected to be even more protective of themselves. Second, considering the fact that the bar of any given state is something of a closed society, lawyers who have been wrongfully discharged might feel that it is better to suffer in silence than to bring an action which might brand them as "troublemakers" and make them less desirable employees in the eyes of other legal employers in the state.

10. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981) [hereinafter MODEL CODE or CODE].

11. In the context of this Article, "legal employer" means the partnership of a law firm or the corporation employing in-house counsel.

Responsibility. While at first glance it would seem that merely providing protection in situations where the requested act in fact would have been a violation would be sufficient, the application of the Code's provisions is such a subtle art that, in many situations, what constitutes a violation may be subject to good faith debate.[12] To encourage ethical behavior, an associate or subordinate lawyer[13] should be protected as long as his interpretation of the rules was reasonable at the time he made the decision.

Under the Model Rules of Professional Conduct,[14] however, a different standard is required. While the Model Rules acknowledge that good faith doubts can exist in the application of a rule in a particular situation, they also explicitly resolve these doubts in favor of the supervising lawyer. A subordinate lawyer cannot be found in violation of the Rules if he acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.[15] Because a subordinate lawyer can violate the Rules even while acting at the direction of another attorney,[16] however, courts in Model Rules jurisdictions should protect such lawyers from discharge in situations where the supervisory lawyer fails to provide a defense of his interpretation of the Model Rules, or the defense offered is patently inadequate.

Part II of this Article illustrates how a cause of action for wrongful discharge can benefit a lawyer who has been pressured by his employer to violate the Code or Model Rules. Part III examines how this cause of action could develop within the existing body of wrongful discharge law. Part IV explores how this cause of action would be applied under the Code and Model Rules. Finally, this Article concludes that a cause of action for wrongful discharge would provide a salutary remedy in situations where the ideal of self-enforcing standards of professional responsibility breaks down.

II. Wrongful Discharge of Attorneys: The Need for Protection

Although discharges of lawyers over disputes involving professional responsibility is still only a theoretical topic of litigation, the

12. *See* G. HAZARD & W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 461 (1985).

13. In this article, the terms associate, meaning a non-partner lawyer working in a law firm, and subordinate lawyer, meaning a lawyer working on a corporation's in-house legal staff, will be treated as substantial equivalents unless the context indicates otherwise.

14. MODEL RULES OF PROFESSIONAL CONDUCT (1985) [hereinafter MODEL RULES].

15. MODEL RULES Rule 5.2(b).

16. MODEL RULES Rule 5.2(a).

potential for these suits is real. The Model Rules explicitly recognize the possibility of such conflicts, and attempt to provide guidelines for their resolution.[17] Furthermore, there are circumstances in all three major areas of private sector legal employment,[18] small firm practice, in-house counsel, and large firm practice, that make associates especially vulnerable to pressure to behave in an unethical manner.

A. Small Firm Associates

Lawyers who practice in firms of less than six attorneys[19] are the foot soldiers of the American legal system. They handle most of the day-to-day legal transactions — real estate closings, drafting of wills, personal injury suits, representation of small businesses, divorce, and criminal defense — which account for most of the contact the average citizen has with the law.[20] Life in the trenches, however, is not always pretty. Although small firm lawyers may be free of some of the pressures imposed on larger firms by large institutional clients,[21] economic survival can be an even more powerful motivation to cut ethical corners. Moreover, small firms probably will lack the procedural machinery suggested by many commentators and, to some extent, the rules themselves, to discover and resolve questions of legal ethics.[22] Finally, one must take a closer look at the economic position of the lawyers who may be asked to place their jobs before their professional responsibilities. A surplus of recent law school graduates currently exists which results in both a shortage of entry-level jobs and low starting salaries. In 1985, for example, one study

17. MODEL RULES Rules 5.1, 5.2. These rules are primarily concerned with imposing disciplinary sanctions; their strengths and weaknesses as rules governing wrongful discharge actions are discussed *infra* notes 155-74 and accompanying text.

18. For obvious reasons, this Article will not discuss solo practitioners. Although many issues discussed in this Article would be relevant to a discussion of employment of public sector lawyers, see Schneyer, *Limited Tenure for Lawyers and the Structure of Lawyer Client Relations: A Critique of the Lawyer's Proposed Right to Sue for Wrongful Discharge*, 59 NEB. L. REV. 11, 15 (1980), the special problems of lawyers working in the public sector are beyond the scope of this Article. For a discussion of some of these issues, see Moran, *Discharge Rights of Attorneys in the Excepted Service*, 33 LAB. L.J. 46 (1982).

19. This Article will follow the convention of the New Jersey State Bar Association and use six lawyers as the dividing line between large and small firms. 116 N.J.L.J. 441, 449 n.20 (Oct. 3, 1985).

20. In New Jersey, for example, two-thirds of all attorneys practice alone or in firms of less than six lawyers. 116 N.J. L.J. 441, 449, col. 2. (Oct. 3, 1985).

21. *See* Kalish, *The Attorney's Role in the Private Organization*, 59 NEB. L. REV. 1, 3-4 (1980) (contrasting small firm and large firm practice).

22. *See* Schneyer, *supra* note 18, at 16-17; Note, *A Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics*, 28 VAND. L. REV. 805, 830-34 (1975); MODEL RULES Rule 5.1, Comment 2.

found that almost sixty percent of new lawyers entering small firm practice earned less than $20,000 in their first year.[23] Since these new lawyers have little economic security, and even small firms can offer employment on "take it or leave it" terms,[24] the potential exists for economic coercion of associates to perform unethical acts. Associates in such circumstances need more protection than is provided by their option (and some have argued obligation) to quit the offending firm and seek employment elsewhere.[25]

B. In-House Counsel

In the case of small firm practice, the associate receives at least some protection from the fact that his employers, the firm's partners, are also bound by the requirements of legal ethics. The second group of private sector lawyers, in-house counsel, usually do not enjoy such solace and face special difficulties when confronted by requests to perform unethical acts. In-house counsel derive all of their professional income from one client-employer.[26] Consequently, this may deprive them of the economic independence usually enjoyed by private practitioners who may not suffer as permanent an economic impact if they refuse clients who request performance of unethical acts.[27] In addition, although the Model Rules contain provisions guiding the behavior of lawyers in the corporate setting,[28] the "support system" of other lawyers, which plays such an important role in resolving ethical dilemmas in the firm context, is likely to be less effective in a corporate setting.[29] An in-house counsel, therefore, may have to make ethical stands on his own.

A lawyer who contributes to management decisions also may face a dilemma when the business expectation of a "team player"[30] conflicts with his professional obligations. Some commentators believe the effectiveness of staff counsel as an ethical restraint on cor-

23. 116 N.J L.J. at 449, col. 1-2 (study performed by the New Jersey State Bar Association).

24. *Id.* at 441, col. 2 (one recent graduate noted "[t]he horror of it . . . is that a firm knows if you don't take an offer, somebody else will.").

25. *See* Schneyer, *supra* note 18, at 17 ("It is difficult to see how the associate has been injured if she happens to be fired before fulfilling her duty to quit.").

26. Schneyer, *supra* note 18, at 14.

27. Kalish, *supra* note 21, at 3.

28. MODEL RULES Rule 1.13 (organization as client) provides procedures for seeking reconsideration or remedy of illegal acts of a corporate client. MODEL RULES Rule 5.1(b) places on a supervisory lawyer in an in-house setting the duty to ensure that conduct of subordinate in-house lawyers conforms to the Rules of Professional Conduct.

29. *See* Note, *supra* note 22, at 831.

30. Kalish, *supra* note 21, at 5.

porate activity depends upon the counsel's credibility. Repeatedly casting staff counsel in the role of critic and objector to management policy threatens this credibility.[31] In many companies, therefore, the expected role for the lawyer may be that of a well paid drone, who informs management of the black-letter law and then implements management's decisions. Under these circumstances, legal assurance that counsel cannot lose his job for upholding his professional ethics could serve as an effective counterweight to economic and institutional pressures.

C. Large Firm Lawyers

The lawyers seemingly least in need of the protection provided by a wrongful discharge action are associates of large law firms. First, unlike in-house counsel, large firm associates receive their instructions from lawyers who are obligated to uphold the Code or Model Rules. In a Model Rules jurisdiction, senior lawyers also must ensure that the associates' activities conform to the Rules.[32] Second, large firms have the resources to provide associates with a body of experienced lawyers and established policies of internal review, which can reduce the frequency with which associates may be ordered to violate their professional ethics.[33] Third, a large firm associate is less likely to be ordered to perform an unethical act because, typically, large firms have the luxury of economic independence. This independence enables them to refuse unethical requests or to condition the firm's continued representation on the client's ethical behavior.[34] At least one commentator has considered that because the position of large firm associates is sufficiently secure, the added protection of an action for wrongful discharge is not required.[35]

Large firms, however, are capable of committing ethical viola-

31. Schaefer, *Professional Tenure: Is it Really a Solution?* 59 NEB. L. REV. 28, 31-32 (1980). The author, a vice-president (law) of the Union Pacific Railroad, opposed a wrongful discharge cause of action on the grounds that it would further isolate corporate attorneys from the decision-making process. *Id.* at 34. It is difficult to see how failure to protect lawyers who refuse to perform unethical acts will improve business ethics, unless one assumes that forcing the staff attorney to stick with management on "small" violations will increase his credibility to dissuade the corporation from "large" violations.

32. *See* MODEL RULES Rule 5.1.

33. *See* Note, *supra* note 22, at 831-33 (describing informal resolution of most ethical disputes and calling for exhaustion of internal firm procedures as a prerequisite for maintaining a wrongful discharge action).

34. *See* Schneyer, *supra* note 18, at 15. *See also* MODEL RULES Rule 1.2(e) (scope of representation within the rules), Rule 1.16(a) (prohibiting representation of a client where such representation will result in a violation of the Rules of Professional Conduct or other law), and MODEL CODE DR 7-102 (representing a client within the bounds of the law).

35. *See* Schneyer, *supra* note 18, at 15-16.

tions. When they do so, the breach frequently is of impressive magnitude.[36] Moreover, if a firm becomes too large, it may cease to function as a firm. Instead, it resembles a large corporation, with the inherent problems of institutional loyalty.[37] The larger a firm becomes, the greater the chance that its management structure will be unresponsive to the needs of associates for ethical direction.[38] Furthermore, it is possible, especially in branch offices, for an entire matter to slip between the cracks of a supervisory system. An associate in a questionable ethical position may be compelled to go over the head of his supervisor to the home office,[39] a process that gives rise to a different set of difficult choices for the associate.[40] Large firm associates may require protection infrequently. When they do need protection, however, they need it as much as any other private sector lawyer who is asked to violate standards of professional conduct.

While the proposed cause of action provides relief for those lawyers who otherwise might sacrifice their employment rather than abide by an ethically questionable order, it does so only as a means to an end. The ultimate goal is to safeguard compliance with both the letter and the spirit of the Code and Model Rules. The following

---

36. *See, e.g.*, Glaberson, Engardio, Crock & Ticer, *A Question of Integrity at Blue-Chip Law Firms*, BUS. WK., Apr. 7, 1986, at 76-80 [hereinafter BUS. WK.] (describing Rogers & Wells agreements to pay $40 million to customers defrauded by one of the firm's clients in a "Ponzi scheme" of which the firm was aware; Cravath, Swaine & Moore's alleged involvement in an illegal $1.3 million payoff to an advisor to the Sultan of Oman to secure a contract for Ashland Oil Inc., one of whose directors is a Cravath partner; and the role numerous indiscretions by Venable, Baetjer & Howard played in the collapse of the Maryland Savings Share Insurance Corp.).

37. Note, *Discharge of Professional Employees: Protecting Against Dismissal for Acts Within a Professional Code of Ethics*, 11 COLUM. HUM. RTS. L. REV. 149, 171 n.103 (1980) [hereinafter *Discharge of Professional Employees*] (statement of a former chairman of General Motors comparing disclosure of violations in the name of professional responsibility to employee disloyalty and industrial espionage). *See also* Note, *The Application of Title VII to Law Firm Partnership Decisions: Women Struggle to Join the Club*, 44 OHIO ST. L.J. 841, 854 (1983) (comparing large law firms to corporations).

38. *See* Levinson, *Ethics Inside the Law Firm*, Book Review, 36 VAND. L. REV. 847-51 (1983) (applying critique of corporate management presented in D. EWING, DO IT MY WAY OR YOU'RE FIRED (1983) to law firms). "[Autocratic firms] . . . reject any expression of concern by an associate and the firm may deny promotion or discharge the associate from employment if the associate persists in questioning the partner's instructions." *Id.* at 851.

39. For example, most of Rogers & Wells' allegedly wrongful conduct with respect to J. David Dominelli's Ponzi scheme occurred in the firm's San Diego office. It was in fact the firm's London office that first raised objections to the client's activities. *See* BUS. WK., *supra* note 36, at 80.

40. *See, e.g.*, Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (employee discharge for going over the head of his supervisor to report actual safety defect in the company's product did not give rise to an action for wrongful discharge). The *Geary* court, however, did recognize that the result might have been different if the employee had some sort of professional obligation to act as he did. *Id.* at 178.

sections will show that the proposed standard does not give subordinate lawyers free reign to replace their employers' legitimate instructions with their own moral values. Rather, it seeks to uphold the mandates of professional responsibility by removing the fear of discharge from the calculus undertaken by a lawyer who confronts an arguable question of professional conduct. In short, it seeks to make ethical conduct as easy as possible.[41]

III. Wrongful Discharge in Professional Employment

Although commentators disagree about where one class of wrongful discharge suits end and the others begin,[42] it is fair to say that an employee can draw support from two potential sources to lay claim to rights exceeding those of an at will employee: the course of dealing of the employer and external sources of public policy.

A. Course of Dealing

The first basis for claiming an exemption from at will treatment arises from within the employment relationship itself. An employee may reasonably expect that certain procedural safeguards protect his employment because of a representation in the employment contract[43] or from the course of dealing of the parties during the employment relationship.[44] Where an employer has instituted such procedures as an internal grievance process, notice of discharge, or severance pay, the employer cannot discharge the employee without honoring these contractual commitments.[45] The trend in these cases is to focus on the use of employee handbooks to flesh out the terms of the employment contract.[46] As one court noted,

---

41. *See* Note, *supra* note 22, at 806.

42. *Compare Discharge of Professional Employee, supra* note 37 at 159-64 and Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1818-24 (1980) (describing judicial limitations on at-will employment in terms of implied contract or public policy grounds) *with* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 322-28, 171 Cal. Rptr. 917, 922-27 (1981) (separating tort and contract public policy cases).

43. *See, e.g.*, Rabago-Alvarez v. Dart Ind., 55 Cal. App. 3d 91, 95, 127 Cal. Rptr. 222, 224 (1976) (employee stipulated he would leave his former place of employment only in exchange for a promise of permanent employment and dismissal only for cause).

44. *See, e.g.*, Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); *Pugh*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (looking to length and nature of the employment relationship to see if an implied promise to discharge for cause only has been created).

45. *See* cases cited *supra* note 44; Weiner v. McGraw Hill Inc., 57 N.Y.2d 458, 465, 443 N.E.2d 441, 445, 457 N.Y.S.2d 193, 197 (1982).

46. *See* Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880 (1980).

> when an employer of a substantial number of employees circulates a manual that, when fairly read, provides that certain benefits are an incident of the employment (including, especially, job security provisions), the judiciary . . . should construe them in accordance with the reasonable expectation of the employees.[47]

It is tempting to base a lawyer's professional responsibility wrongful discharge claim on these grounds, considering either the Code or the Model Rules to be the equivalent of an employee handbook. Rules of legal conduct define how a lawyer is supposed to act in certain situations; law firms and corporate employers know that the lawyer is bound to conform his conduct to the state's standards of professional responsibility. Furthermore, under the Model Rules, a subordinate lawyer knows that a supervisory lawyer has an affirmative duty to take reasonable steps to ensure that the subordinate upholds his professional obligations.[48] Thus, some terms and conditions of legal employment are defined by the Code or Model Rules. In fact, other professionals occasionally expressly incorporate professional codes of ethics as terms of their employment contracts.[49] If a firm has a general policy to discipline unethical lawyers or an informal grievance procedure to resolve internal disputes as to the meaning of the Code or Model Rules,[50] legal employment could come within the course of dealing-employee handbook wrongful discharge cases.

There are problems with this view, however. First, it is questionable whether it is accurate to describe the Code or Model Rules as benefits incident to employment. Second, as the case quoted above illustrates, courts place great weight on terms which reasonably appear to be job security provisions,[51] which the Code and Model Rules do not. Finally, the rationale for binding employers to the terms of an employee handbook is that they could reasonably expect such interpretations of language they themselves have drafted.[52] This is certainly not the case with the Code or Model Rules. While law-

47. Woolley v. Hoffmann LaRoche, Inc., 99 N.J. 284, 297-98, 491 A.2d 1257, 1264 (1985).

48. MODEL RULES Rule 5.1.

49. *See* Wood v. Upjohn Co., No. 6093-1-II slip op. (Wash. App. September 4, 1984) (employment contract of doctor serving as corporate officer incorporated American Medical Association's code of ethics).

50. *See Woolley*, 99 N.J. at 307-08, 491 A.2d 1257, 1269-70; Weiner v. McGraw-Hill, 57 N.Y.2d 458, 460, 443 N.E.2d 441, 445 (1982) (discussing obligation of employers to comply with established grievance procedures before discharging an employee).

51. *See, e.g., Woolley*, 99 N.J. at 297-98, 491 A.2d at 1264.

52. *Id.* at 306, 491 A.2d 1269.

yers in individual cases may be able to establish claims based on their firms' adoption of the Model Rules or the Code as an internal disciplinary standard or of an internal dispute resolution procedure, a general right of recovery will have to come from another source.

B. Legal Ethics as Public Policy

Those cases which hold that an employee cannot be discharged for a reason that contravenes a recognized principle of public policy illustrate the most flexible basis for a wrongful discharge suit.[53] This theory has been applied through both contract and tort law on the grounds that such a discharge is illegal because an explicit contract term providing for discharge for such a reason would be unenforceable on grounds of public policy[54] or on the grounds that the law created a legal duty from the employer to the employee not to discharge the employee for such reasons.[55] Although whether the cause of action sounds in contract or in tort will have important consequences to litigants concerned with seeking punitive damages or different statutes of limitations,[56] the process of establishing the cause of action is more or less the same, and the final nature of the action will probably be determined more than anything else by whether the state in question recognizes the tort or contract branch of the public policy cause of action.[57]

1. Professional Responsibility as Public Policy.—Whether the action is in tort or contract, one must show that the discharge violates some recognized public policy.[58] Although some courts have found that they are capable of discerning public policy on their own initiative,[59] most courts defer to an independent statutory[60] or consti-

53. *See, e.g.*, Petermann v. Teamsters Local 369, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Tamaney v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

54. *See, e.g., Petermann*, 174 Cal. App. 2d 184, 344 P.2d 25.

55. *See, e.g., Tamaney*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839.

56. *See* Note, *supra* note 42, at 1843-44 (discussing difference between tort and contract based analyses).

57. For a table detailing which states recognize the various tort and contract causes of action, see B.N.A. Labor Relations Reporter, Individual Employment Rights Manual 505:51 (State Rulings Chart) (1987).

58. *See, e.g.*, Novosel v. Nationwide Ins. Co., 721 F.2d 894, 899 (3d Cir. 1983) ("The key question in considering the tort claim is therefore whether a discharge for disagreement with the employer's legislative agenda . . . sufficiently implicate[s] a recognized facet of public policy.").

59. The most frequently cited example of this is *Monge*, 114 N.H. 130, 316 A.2d 549, in which the court found that allowing discharge of an employee who resisted sexual advances of her supervisor violated the public policy in favor of improved labor relations.

60. *See* Note, *supra* note 42 at 1822-23 (public policy cause of action usually limited to

tutional[61] definition of public policy. Although codes of professional conduct are not statutes, they do serve a closely analogous function.[62] Therefore, the codes of many professions may serve as reliable expressions of public policy.

In *Pierce v. Ortho Pharmaceutical Corp.*,[63] the New Jersey Supreme Court noted that "[i]n certain instances, a professional code of ethics may contain an expression of public policy."[64] *Pierce* involved a claim by a doctor that she was constructively discharged for refusing to conduct laboratory development of a drug on the grounds that it contained saccharin. Dr. Pierce claimed that any work on a drug containing this potentially carcinogenic substance would violate her interpretation of the Hippocratic oath. Although the court rejected Dr. Pierce's claim on the grounds that her refusal to continue development of the drug was based on her own personal morals rather than any professional code of conduct,[65] the discussion of her claim provides valuable insight into the use of professional codes as standards of public policy.

The *Pierce* court began by recognizing the public policy cause of action[66] and stated that standards of public policy play an important role in employment relationships. The court then noted,

> Employees will be secure in knowing that their jobs are safe if they exercise their rights in accordance with a clear mandate of public policy. On the other hand, employers will know that unless they act contrary to public policy, they may discharge employees at will for any reason.[67]

Obviously, this standard places a premium on designating unambiguous sources of public policy so that both employers and employees can be sure of their relative rights. While recognizing that the duty of professional employees to abide by their professions' code of ethics "may oblige them to decline to perform acts required by

situations where employer's action would undermine a statutory public policy); *Discharge of Professional Employee*, *supra* note 37, at 160 (congress or state legislatures are the presumed source of public policy pronouncements).

61. *See Novosel*, 721 F.2d at 899 (first amendment of the federal constitution and article I section 7 of the Pennsylvania Constitution are cognizable expressions of public policy).

62. For a discussion of the role of professional codes of ethics in regulating the profession and safeguarding the health, safety, and welfare of the public, see *Discharge of Professional Employees*, *supra* note 37, at 165-68.

63. 84 N.J. 58, 417 A.2d 505 (1980).

64. *Id.* at 72, 417 A.2d at 512.

65. *Id.* at 74-75, 417 A.2d at 513-14.

66. The court recognized the cause of action sounded in both tort and contract. *Id.* at 72, 417 A.2d at 512.

67. *Id.* at 73, 417 A.2d at 512.

their employers,"[68] the *Pierce* court made it clear that it was the incompatibility of the employer's request with public policy, not with a professional code, that makes a discharge actionable.[69] Before a discharge of an employee refusing to violate a professional code becomes actionable, therefore, the code itself must be considered a clear mandate of public policy. According to the *Pierce* court:

> In certain instances, a professional code of ethics may contain an expression of public policy. However, not all such sources express a clear mandate of public policy. For example, a code of ethics designed to serve only the interests of a profession or an administrative regulation concerned with technical matters probably would not suffice.[70]

Once the court answers this threshold question of defining public policy in terms of a professional code, it then must inquire into the reasons for the employee's refusal to perform the requested act. This involves making a distinction between professional ethics and individual morals. Under this standard, an employee who refuses to work on a project he or she believes is unethical (meaning it is in conflict with a clear mandate of public policy) would be protected, while an employee who refuses to work on account of individual conscience does so at his or her own risk.[71] The court noted that chaos would result if every employee could determine, according to his personal conscience, whether a project begun by his employer should continue.[72] Limiting this right to factors recognized in professional codes, therefore, strikes a balance between the supervisory authority of the employer and the individual conscience of the employee.

Two subsequent New Jersey cases illustrate the practical implications of this distinction. In *Warthen v. Toms River Community Memorial Hosp.*,[73] a nurse refused to dialyze a terminally ill patient on the grounds that doing so would be a breach of medical ethics since the Code for Nurses provides that "[i]f personally opposed to the delivery of care in a particular case because of the nature of the health problem or the procedures to be used, the nurse is justified in

68. *Id.*, at 71, 417 A.2d at 512.

69. *Id.* at 72, 417 A.2d at 512 ("unless an employee at will identifies a specific expression of public policy, he may be discharged with or without cause."). For another analysis of this case, praising its reasoning but criticizing its result, see *Discharge of Professional Employees, supra* note 37, at 180-87.

70. *Id.* at 72, 417 A.2d at 512.

71. *Id.* at 75, 417 A.2d at 514.

72. *Id.*

73. 199 N.J. Super. 18, 488 A.2d 229 (App. Div. 1985).

refusing to participate."[74] A state appellate court upheld the nurse's discharge. It found that the Code of Nurses was not a clear mandate of public policy because it defined a standard of conduct beneficial only to the individual nurse and not to the public at large.[75] In *Kalman v. Grand Union Co.*,[76] however, a pharmacist proved that the rules of the Board of Pharmacy qualified as clear mandates of public policy.[77] He also showed that the professional code and state law justified his refusal to leave his pharmacy unattended by a pharmacist while the rest of the store was open for business.[78] Thus, the court found that his discharge for disobeying his employer's order to leave the pharmacy unstaffed during store hours was wrongful.

2. Legal Ethics as a Clear Mandate of Public Policy.—Protecting the integrity of the legal process has long been recognized as a public policy important enough to justify exceptions to the at will employment rule.[79] *Petermann v. International Bhd. of Teamsters*,[80] one of the earliest at will wrongful discharge cases, held that an employer could not discharge an employee for refusing to commit perjury because the "presence of false testimony in any proceeding tends to interfere with the proper administration of justice."[81] For similar reasons, employers who have discharged employees for serving on juries have been found liable in wrongful discharge suits. One court observed that the "community's interest in having its citizens serve on jury duty [is] so important that an employer, who interferes with that interest by discharging an employee who served on a jury, should be required to compensate his employee."[82] If one views the Code and Model Rules as benefitting the public by protecting the integrity of the legal process, this view will satisfy the first part of the *Pierce* test, thereby allowing a lawyer who has been discharged for refusing to perform what he believed to be an unethi-

74. *Id.* at 26, 488 A.2d at 233 (quoting American Nurses Assoc., Code for Nurses with Interpretive Statements Rule 1.4 at 5 (1981)).

75. *Id.* at 27, 488 A.2d at 233. The court also found that the nurse's refusal was based on her own personal morals rather than any provision of the Code of Nurses. *Id.* at 28, 488 A.2d at 234.

76. 183 N.J. Super. 153, 443 A.2d 728 (App. Div. 1982).

77. *Id.* at 158, 443 A.2d at 730 (noting that the purpose of registering pharmacists is to protect the public from the dangers attendant upon the sale of drugs by unqualified persons).

78. *Id.* at 159, 443 A.2d at 730-31.

79. Kalish, *supra* note 21, at 7-8 (basing his proposal of a wrongful discharge action for lawyers on the need to protect the integrity of the legal process).

80. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

81. *Id.* at 188, 344 P.2d at 27.

82. Nees v. Hocks, 272 Or. 210, 218, 536 P.2d 512, 516 (1975); *accord*, Reuther v. Fowler & Williams Inc., 255 Pa. Super. 28, 32, 386 A.2d 119, 120 (1978).

cal act to maintain an action for wrongful discharge.

A brief survey of the treatment of legal ethics standards outside the employment law context shows that courts already consider the Code and Model Rules to be clear mandates of public policy. In the context of disqualification of attorneys from representation on particular matters when representation would violate the Code or Model Rules, courts have found the principles embodied in these ethical standards to outweigh the conflicting public policy that a litigant may choose his own lawyer.[83] For example, in *Wagner v. Lehman Bros. Kuhn Loeb Inc.*,[84] the court disqualified Wagner's attorney after determining that he was guilty of numerous ethical violations.[85] The court, weighing the need to ensure ethical conduct against Wagner's right to freely chosen counsel, found that the Code violations at issue created an "appearance of impropriety" that outweighed any interest Wagner had in representation by counsel of his choice.[86]

The use of legal ethics violations as evidence of legal malpractice also strongly supports consideration of the Code and Model Rules as clear mandates of public policy. Codes of legal ethics play a large role in defining the standard of care required for the practice of law. In Florida, for example, although a violation of the Code is not considered negligence per se, it may be used as some evidence of negligence.[87] Other states have equated a violation of the Code to a violation of a statute, both of which serve as evidence of negligence.[88] As a court in Michigan has stated:

> The Code of Professional Responsibility is a standard of practice for attorneys which expresses in general terms the standards of professional conduct expected of lawyers in their rela-

83. Actually, disqualification is usually justified on the grounds that allowing continued representation in the face of such violations would threaten the integrity of the legal profession by creating, at the very least, an appearance of impropriety. *See* MODEL CODE Canon 9; DR 9-101.

84. 646 F. Supp. 643 (N.D. Ill. 1986).

85. One of the lawyers in the firm representing Wagner had, in concert with Wagner, contacted a party opponent without contacting the party's lawyer and persuaded the party to testify against a co-defendant in return for a percentage of the plaintiff's recovery. These acts violated DR 7-104(a), prohibiting communication with a party represented by counsel, and DR 7-109(c), prohibiting contingent fee compensation of a witness. In addition, another lawyer in the firm had taken an active role in an investigation of the defendants while working as a lawyer for the Securities and Exchange Commission. Since this lawyer played an active role in Wagner's case, his participation violated DR 9-101(b), prohibiting private employment of a lawyer in a matter in which he was involved as a public employee. *See Wagner*, 646 F. Supp. at 655-69.

86. *Id.* at 660.

87. Oberon Investments, N.V. v. Angel, Cohen, Rogovin, 492 So. 2d 1113, 1114 n.2 (Fla. App. 1986).

88. Fishman v. Brooks, 396 Mass. 643, 649, 487 N.E.2d 1377, 1381 (1986).

> tionships with the public, the legal system, and the legal profession. Holding a specific client unable to rely on the same standards in his professional relations with his own attorney would be patently unfair. We hold that, as with statutes, a violation of the Code is rebuttable evidence of malpractice.[89]

If violation of the Code or Model Rules is evidence of a lawyer's civil liability, the Code or Rules should be a sufficient mandate of public policy to justify the conclusion that an employer who attempts to subvert the Code by threat of discharge will face civil liability for his actions.

IV. Wrongful Discharge Under the Code and Model Rules

This Article proposes that under the Code, a lawyer should be protected from discharge whenever he refuses to comply with an employer's request which he reasonably believes would violate the Code. Under the Model Rules, such a standard is precluded by Model Rules 5.1 and 5.2, which define the ethical relationship between supervisory and subordinate lawyers. The Rules, however, impose a duty upon supervisory lawyers to ensure that subordinates uphold their ethical obligations and, furthermore, provide that a subordinate lawyer cannot escape discipline on the grounds that he was acting on the instruction of another.[90] These two provisions place upon the legal employer a duty not only to discuss the ethical question with the subordinate, but to provide a reasoned explanation of why the proposed action would not violate the Model Rules. Absent such a reasoned explanation, the subordinate should be protected from discharge.

The primary objection to the use of a wrongful discharge action in a legal employment setting is that it will interfere with the supervisory lawyer's zealous representation of his client.[91] This objection has some validity. A primary purpose of creating the cause of action is to deter legal employers from asking their lawyers to perform what may be unethical acts. Too much deterrence, however, might have a chilling effect on zealous representation.[92] On a more practical level, allowing subordinate lawyers too much freedom to define

89. Lipton v. Boesky, 110 Mich. App. 589, 313 N.W.2d 163, 166-67 (1981). It would appear that California pays even greater deference to its own Rules of Professional Conduct. *See* Kirsch v. Duryea, 21 Cal. 3d 303, 311, 578 P.2d 935, 146 Cal. Rptr. 218, 222 (1978) (specific rule governing a situation can establish the standard of care).

90. MODEL RULES Rule 5.2(a).

91. *See* MODEL CODE Canon 7.

92. *See* Schneyer, *supra* note 18, at 13.

the scope of their duties will subject the supervisory lawyer to endless second guessing, which will make managing a law firm or legal department even more difficult.[93] Finally, the possibility exists that lawyers who have been asked to leave the firm for other reasons will seize upon the cause of action as a pretext to seek a damage award against former employers.[94] Although these objections are substantial, the prerequisites of the cause of action, as well as the nature of the legal profession, make it unlikely that the potential drawbacks of the cause of action will outweigh its benefits to both the lawyers who bring such suits and the legal process as a whole.

The proposed cause of action draws a clear distinction between professional ethics and personal morals. This distinction is a threshold question of law which would normally be resolved on a motion for summary judgment. As the court in *Pierce* observed: "[a]n employee at will who refuses to work for an employer in answer to a call of conscience should recognize that other employees and their employer might heed a different call."[95] A law firm, therefore, as one of the terms of the lawyer's employment, has the right to expect its associates to comply with its determination of how to represent the firm's clients, so long as this determination does not threaten a clear mandate of public policy.[96] In the end, the cause of action should protect the public by safeguarding the integrity of the legal process, not the conscience of any one individual.

Another consequence of the distinction between professional ethics and personal morals is that certain provisions of the Code will not be sufficient legal grounds to refuse an employer's directive. The Ethical Considerations, for example, are useful interpretive guides to the Disciplinary Rules. They cannot, however, serve as clear mandates of public policy because they are aspirational in nature.[97] Furthermore, some Disciplinary Rules are cast in permissive, rather than mandatory language.[98] In these cases, while it is clearly in the public interest to allow a client's counsel discretion to act, this discretion is properly vested in the firm and not in any one associate who is handling a particular aspect of the representation.[99] For ex-

93. *See* Note, *supra* note 22, at 832.
94. *Id.* at 836.
95. *Pierce*, 84 N.J. at 75, 417 A.2d at 514.
96. *Id.* at 73, 417 A.2d at 512.
97. Schneyer, *supra* note 18, at 19.
98. *See, e.g.*, MODEL CODE DR 4-101(C), allowing disclosure of confidences in certain situations, and DR 7-101(B), permitting a lawyer to use his professional judgment to waive certain rights of his client.
99. One commentator has suggested reversing this allocation of authority and giving the

ample, assume an associate arguing a summary judgment motion fails to raise a non-frivolous but unpersuasive ground for dismissal despite a contrary order from his supervising partner. The associate is clearly within his rights under DR 7-101(B)(1).[100] Because there was nothing unethical about the request, however, the associate should not be protected from discharge. The wrongful discharge action only protects an associate from ethical dilemmas; it does not condone an at will employee's insubordination in situations when no ethical issues are involved.

A. Wrongful Discharge Under the Code

Situations in which a subordinate lawyer might be asked to perform an unethical act fall into two categories. The first involves "bad man" cases in which a legal employer decides that a Code violation is in the client's best interest and uses his position to coerce a subordinate into committing the breach. Most commentators have addressed this class of cases.[101] The second category includes employers acting without malice who force a subordinate lawyer into ethical dilemmas.[102] The law of lawyering is sufficiently subtle that reasonable minds may differ as to its meaning.[103] Moreover, these doubts can be compounded by conflicting resolutions of problems in other jurisdictions and, in cases where the Code has undergone recent amendment, by the confusion which typically accompanies a change in legal standards. In such situations, even in the absense of any bad faith, a subordinate lawyer may have to choose between upholding the ethics of his profession and retaining his job.

1. Bad Faith Requests to Violate the Code.—It is difficult to conceive of any principled objection to imposing civil liability on an employer who knowingly attempts to coerce a lawyer into violating the Code.[104] To show how such a cause of action would be applied,

---

individual lawyer, who is the lawyer most involved in the representation, the discretion to make ethical decisions. *See* Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WISC. L. REV. 473, 532.

100. *See supra* note 98.

101. *See, e.g.*, Kalish, *supra* note 21, at 4; Schneyer, *supra* note 18, at 20; Confer, *Professional Tenure as a Means to Promote Ethical Compliance in the Civil Discovery Process*, 59 NEB. L. REV. 35, 36 (1980).

102. *See* MODEL CODE DR 1-102(A)(2) ("A lawyer may not circumvent a Disciplinary Rule through the actions of another.").

103. HAZARD & HODES, *supra* note 12, at 461.

104. *But cf.*, Schaefer, *supra* note 31, at 31-34 (arguing that such a rule will isolate staff attorneys from the rest of management); Confer, *supra* note 102, at 39 (arguing that the harm to the confidence of the public in the legal profession caused by the airing of "dirty laundry" would outweigh the value of the cause of action in deterring future abuses).

however, it is helpful to consider examples of how an actionable situation could arise in various legal settings. To the extent that such hypotheticals are plausible, they support the proposition that the need for a recognized cause of action is greater than the present lack of cases suggests.

Assume a partner in a small law firm calls into his office a recently hired associate and assigns the associate to defend a valued client in a personal injury suit. The partner informs the associate that the case is to be settled as quickly as possible and gives the associate the plaintiff's phone number. When the associate asks for the phone number of the plaintiff's lawyer, the partner replies: "in this office we deal directly with the other party whenever possible; there's no sense going through some plaintiff's lawyer who will only make things more expensive and time consuming for everyone." The associate points out that direct contact with the opposing party would violate DR 7-104.[105] The partner merely holds up a file of resumes of lawyers who have recently passed the state bar exam and informs the associate that if he does not make the phone call there are plenty of other people with his qualifications who will.[106] If the associate still refuses to make the call and is fired, under the proposed standard, he should be allowed to recover in an action for wrongful discharge.

The above example represents the simplest possible case: a knowing request to violate a mandatory Model Code disciplinary rule coupled with an explicit threat of discharge. Most cases will not be that simple. Assume, for instance, a situation where in-house counsel representing his company in an antitrust action receives a document request for all communications between the company's president and the management of other companies allegedly involved in a price fixing scheme.[107] When he presents the request to the company president, the president produces a file containing a "smoking gun." After the attorney explains the significance of the documents and the discovery request, the president informs the attorney that the company cannot afford to lose this lawsuit and reminds the attorney where his loyalties should lie.[108] The attorney discloses the docu-

105. MODEL CODE DR 7-104(A)(2) (prohibiting communication with a party known to be represented by counsel).

106. *See supra* notes 23-25 and accompanying text (discussing economic vulnerability of young associates in small firm practice).

107. *See* Confer, *supra* note 101, at 33-37 (describing incentives for unethical behavior in discovery).

108. *See* Schneyer, *supra* note 18, at 25 (describing a similar hypothetical involving a request to use perjured testimony); Schaefer, *supra* note 31, at 31-34 (discussing conflicting

ments anyway, and the company loses the case. A short time afterwards, the company dismisses the attorney, citing his poor trial performance.

This is a much more textured factual scenario for the application of a wrongful discharge cause of action. First, there is a question concerning whether the president in fact requested the attorney to refuse to comply with the discovery request. In addition, even assuming the president made the request, there is still a question as to whether his refusal to "lose" the documents was the motivation for the discharge. The company probably would argue that it no longer had confidence in an attorney whose failure to win a case resulted in a substantial judgment against the company. Finally, there is reason to believe that the lawyer might be prohibited from testifying to the conversation with the company president on the grounds that the conversation involved confidential communications.

On the issues of whether the lawyer was in fact requested to disobey the discovery request and whether he was fired for disclosing the "smoking gun," there are questions of fact which would have to be resolved at a trial. The lawyer would have the burden of proving that his failure to violate the Code was the reason for the discharge.[109] In this context, however, two observations should be made. First, people in positions of authority do not always have to phrase their orders as commands in order to communicate their intentions.[110] The meaning of the words used by the president will have to be determined by the jury. Second, even if the jury determines that no order was intended at the time, the discharge would still be wrongful if the reason the company is dissatisfied with the lawyer's performance is that he placed ethical factors before company loyalty. There would still be a jury question as to whether the company's proffered explanation for the discharge was merely a pretext for retaliation against counsel for refusing to engage in unethical behav-

---

loyalties of in-house counsel). The hypothetical suggested here would involve a violation of MODEL CODE DR 7-102(A)(3) (a lawyer shall not conceal or knowingly fail to disclose that which he is required to reveal).

109. *See* Note, *supra* note 22 at 833-34 (discussing burden of proof).

110. For a literary example of this, *see* W. Shakespeare, *Richard II*, act V, scene iv, lines 7-11:

> And speaking it he wishfully looked on me,
> As who should say "I would thou wert the man
> That would divorce this terror from my heart!"
> Meaning the king at Pomfret. Come, let's go.
> I am the king's friend, and will rid his foe.

After Exton kills Richard II, Henry IV later claims to have intended nothing of the kind. *See* act V, scene vi, lines 34-44.

ior.[111] While this may be a difficult determination of fact, it is no more difficult here than in the other areas of employment law in which it is confronted.[112]

Focusing on the confidence question, at least one commentator has raised the objection that the language of DR 4-101(C)(4), which allows an attorney to disclose client confidences in order to collect a fee or to defend against an accusation of wrongful conduct, might not allow disclosure in cases where the lawyer has already been paid for services rendered and brings a tort action against his former employer.[113] While this may be a plausible interpretation of the language of the rule itself, it is contrary to the policy behind the exception. DR 4-101(C)(4) itself cites to ABA Opinion 250,[114] which provides that "if it became necessary for the attorney to bring an action against the client, the client's privilege could not prevent the attorney from disclosing what was essential as a means of obtaining or defending his own rights."[115] If DR 4-101(C)(4) were interpreted otherwise, employers could engage in such behavior with impunity because it would be a rare case in which an attorney could prove such misconduct without resorting to the use of confidential communications.[116] Therefore, if the cause of action is to exist at all, the lawyer has a strong argument that he must be able to disclose the client communications.[117]

Although the previous two hypotheticals involved lawyers in small firms and in-house counsel, one could easily conceive of situations in which the settings were reversed, or in which either scenario was played out in a large law firm. Still, one hopes that a large firm has an internal procedure to protect an associate from possible exploitation by a rogue partner.[118] Structural protection, however, might not aid a lawyer in circumstances when the request to perform the objectionable act is due not to bad faith, but to a reasonable

111. *See* Note, *supra* note 22, at 833-34.

112. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (discussing treatment of pretextual reasons for discharge in litigation under Title VII).

113. *See* Schneyer, *supra* note 18, at 25.

114. MODEL CODE DR 4-101(C)(4) n.19.

115. ABA Comm. on Professional Ethics and Grievances, Formal Op. 250 (1943). *See also* Hull v. Celenese Corp., 513 F.2d 568 (2d Cir. 1975).

116. *See* Note, *supra* note 22 at 832-33 (discussing problems of proof).

117. It should not be necessary to resort to a policy argument to establish a right to disclose such confidential communications in a MODEL RULES jurisdiction, since MODEL RULES Rule 1.6(b)(2) permits the lawyer to reveal information related to the representation "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."

118. *See supra* notes 32-34 and accompanying text (describing the institutional factors providing greater assurance of ethical behavior in large law firms).

disagreement as to the requirements of the Code.

2. When Reasonable Minds Differ.—As previously mentioned, bad faith by the employer is not necessary for a lawyer to be confronted with a choice between insubordination or committing what he believes to be a breach of ethical duty. In part, the Code itself is the source of problems of this sort. As one textbook on professional responsibility observes:

> Many people believed that the Code, the product of several years work by a distinguished commission, had resolved all questions which were worth considering. Almost as soon as significant numbers of people began to look seriously at the Code, however, they realized that the Code had answered many questions badly and left others unresolved altogether.[119]

Even when the Code is a reliable guide, the issues involved are occasionally so subtle that good faith doubts exist as to the outcome of the application of the Code to a particular set of facts.[120] These factors can be complicated either by a lack of controlling authority interpreting the provisions, or by conflicting interpretations in other jurisdictions. While situations are more dramatic when both parties know the proposed action is wrong, cases in which a supervisory and subordinate lawyer in good faith reach conflicting resolutions of an issue will probably be more common.[121]

The one reported case involving employee discipline arising out of a refusal to violate the Code centered on the question of good-faith doubt. In *Lowry v. Board of Industrial Insurance Appeals*,[122] a lawyer employed as an industrial appeals judge was suspended for three days for refusing to permit lay persons to represent parties before him, despite a rule promulgated by the Board allowing lay representation.[123] Lowry claimed he could not obey the regulation because to do so would be a violation of the Disciplinary Rules that prohibit aiding the unauthorized practice of law[124] and that two state attorney general letter opinions supported his interpretation of the

119. T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 1 (1984) [hereinafter MORGAN & ROTUNDA].

120. HAZARD & HODES, *supra* note 12, at 461.

121. This, of course, assumes that the great majority of lawyers in fact try to behave ethically, and the low percentage of lawyers ever disciplined during their careers, (one study has put this figure at two-tenths of one percent, *see* BUS. WK. *supra* note 36, at 76), is due to the overall ethical character of the bar rather than to lax enforcement.

122. 102 Wash. 2d 58, 684 P.2d 678 (1984).

123. *Id.* at 61, 684 P.2d at 679.

124. *See, e.g.*, MODEL CODE DR 1-101, DR 1-102, DR 3-101(A).

Code. The Board, however, argued that the issue had never been resolved in the state courts and at least one other state allowed lay representation.[125] The Supreme Court of Washington, in resolving this dispute in favor of Lowry, observed:

> We would do individual courage and integrity a great injustice were we to require employees to follow unquestioningly their master's bidding. A person with courage enough to risk employer sanctions, hostile reactions from colleagues, or possible discharge and the disgrace that accompanies it by disobeying a superior's order on the belief that it would be illegal or unethical to act otherwise, is entitled to a determination of the reasonableness of his belief.[126]

The court found that Lowry's belief that compliance with the regulation would have violated the Code was reasonable and ruled that his suspension was improper.[127] Although Lowry was a public employee and confronted a suspension rather than a discharge, it appears that neither of these factors influenced the court's decision.[128] In addition, while the court placed some weight on the fact that Lowry's position was supported by an attorney general position paper,[129] this appears to have been considered merely an aid, rather than a prerequisite, to establishing the reasonableness of his belief. Finally, it is important to note that the court found it unnecessary to determine whether the requested action actually violated the Code; a reasonable belief on the part of the employee was enough.

The most controversial aspect of the cause of action proposed by this Article is that an employee may recover merely by showing that his interpretation of the Code's requirements was reasonable. Other proposals have conditioned recovery on proof by the discharged lawyer that the requested action actually violated the Code. These proposals argue that an associate should bear the risk of challenging a partner's interpretation of a questionable area of the law.[130] While several reasons have been advanced for drawing the line at actual violations, the vitality of these arguments does not withstand close inspection.

---

125. *See* Eagle Indem. Co. v. Industrial Accident Comm'n., 217 Cal. 244, 18 P.2d 341 (1933). Such representation is allowed before some federal agencies. *See, e.g.*, Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) (non-lawyers allowed to act as representatives in proceedings before the Veterans' Administration).

126. *Lowry*, 102 Wash. 2d at 64-65, 684 P.2d at 682.

127. *Id.* at 67, 684 P.2d at 682.

128. *Id.* at 61, 684 P.2d at 679.

129. *Id.* at 67, 684 P.2d at 682.

130. *See, e.g.*, Kalish, *supra* note 21, at 6.

One commentator has argued that any standard other than requiring an actual violation would elevate individual ideas to a position of primacy.[131] This argument is based on a premise that ethical objections are indistinguishable from questions of individual conscience.[132] The distinction between individual morals and professional ethics required by the *Pierce* test as a prerequisite to establishing a cause of action, however, undermines this premise.[133]

The same commentator also has expressed concern over the possibility of an associate being rewarded for an incorrect determination of the law.[134] This objection, however, loses sight of the fact that the subordinate lawyer will have the burden of showing his position was reasonable. Furthermore, it is unlikely that a subordinate lawyer, whose prospects for job advancement will depend upon staying in his employer's good graces,[135] will object to a more experienced lawyer's resolution of an ethical question unless he is sure his own resolution is *very* reasonable. In such circumstances, discussion of ethical questions should be encouraged as much as possible.[136] Giving a subordinate safe refuge in the reasonableness of his position might provide the necessary encouragement for him to risk employer sanctions and make an ethical objection to an employer's request. Without the ability to rely on the reasonableness of his belief, subordinate lawyers probably will defer to their superiors in any case in which the law is not absolutely clear. This would reduce the burden of explanation required of the employer to a mere "straight face" standard, which will not advance significantly the cause of furthering legal ethics.

Perhaps the most persuasive objection to the reasonableness standard is that an experienced supervisory lawyer is so much more likely than his subordinate to reach a correct resolution of an ethical problem that there is little gain from allowing a cause of action against the partner unless the partner is later shown to have been mistaken.[137] Several counterweights, however, support the reasonableness standard. First, the objection is based on the premise that the

131. *See* Note, *supra* note 22, at 832.

132. *See supra* notes 71-78 and accompanying text (applying the *Pierce* standard).

133. *See supra* notes 63-72 and accompanying text (discussion the *Pierce* test).

134. *See* Note, *supra* note 22, at 832.

135. *See* Hishon v. King & Spaulding, 467 U.S. 69 (1984) (recognizing discretionary nature of partnership decisions, although concluding that Title VII applies to such decisions).

136. *See* Schneyer, *supra* note 18, at 16.

137. One commentator has taken this a step further and suggested limiting recovery to situations where the employer's request was both incorrect *and* in bad faith. *See* Schneyer, *supra* note 18, at 18 n.14.

employer is in possession of superior legal knowledge. In the in-house counsel setting, however, where the need for protection is perhaps the greatest, there is no assurance that the superior will even be a lawyer. Moreover, the rationale proposed by opponents emphasizes the "defer to superiors as a matter of course" manner of thinking, which the cause of action is intended to combat. The purpose of granting a right to sue for wrongful discharge is to ensure that the actual course of representation conforms as closely as possible to the mandates of public policy expressed in the Code. The fact that a lawyer has the right to refuse to act as long as his objection is reasonable puts him in a much better position to force a reluctant superior[138] into a full exploration of the problem. From this process a correct resolution is more likely to result.[139]

Furthermore, the fact that this cause of action exists creates a duty on the part of the associate to engage in ethical debate. Without any intended insubordination or disrespect for the employer, the lawyer can claim in good conscience that he has a duty to serve as a "devil's advocate" in order to explore more fully close ethical questions. Forcing a subordinate lawyer to take full responsibility for his ethical choices also eliminates the specter of subordinate lawyers attempting to raise a "Nuremberg" defense as a means of mitigating punishment.[140]

There are also circumstances in which the fact that the supervisory lawyer is right has little to do with his superior knowledge of the law. Assume, for example, that while Lowry's case was pending the Washington Supreme Court had "vindicated" the Board's position in *Lowry* regarding representation by non-lawyers by a 4-3 vote, with the justices making their decisions on the basis of a policy of safeguarding the integrity of the legal process by providing inexpensive procedures for resolution of administrative claims.[141] Under an actual violation standard, Lowry's suspension would have been upheld, even though he did not have the benefit of the court's guidance

138. Even those against providing wrongful discharge protection to lawyers at least recognize the possibility that large fees and long term loyalties can bias partners towards overzealous representation in interpreting their professional duties. *See id.* While Schneyer discounted this argument due to lack of empirical support, the recent rash of ethical disputes involving partners at such firms as Rogers & Wells and Cravath, Swaine, & Moore adds some support to the validity of the hypothesis. *See* BUS. WK., *supra* note 36, at 76.

139. *See* Schneyer, *supra* note 18, at 16 (recognizing the value of law firms making ethical judgments collectively).

140. *See* Levinson, *supra* note 38, at 851 n.9 (describing an occasional practice under the current CODE).

141. *See Lowry*, 102 Wash. 2d at 60, 684 P.2d at 679.

at the time he was forced to make an ethical decision.[142] In such circumstances, it is unfair to have the job security of the employee turn on how the court, out of necessity, eventually decided a close question of law.[143] Instead, the outcome should depend upon the reasonableness of the employee's resolution of the unsettled legal questions at the time he was forced to act.[144]

The problems related to unsettled law also give rise to another issue: Adoption of an actual violation standard will force courts to decide disciplinary questions in the context of a tort suit. The actual violation standard not only requires the resolution of legal ethics issues outside of the disciplinary procedures that have been established to interpret and enforce ethical standards,[145] but it also risks presenting the dispute without an accurate assessment of the impact of its decision on clients and the legal process as a whole. Following the lead of the *Lowry* court in basing its decision on the reasonableness of the position taken appears to be the optimal standard to apply when deciding a lawyer's claim that he has been wrongfully discharged.

The reasonableness standard will not pose an unbearable burden on legal employers. Rather it will contribute to a more accurate resolution of ethical questions. For example, assume an associate is concerned that the client he represents in a transaction is perpetrating a fraud. On the basis of non-privileged information available to him, the associate believes he can make a good case that the client is committing a fraud and presents this evidence to the partner in charge of the case. The partner, who had no knowledge of the information disclosed by the associate, discloses to the associate confidential communications which, in conjunction with the non-privileged information, clearly establish that the client is engaged in a fraud. The partner expresses the firm's concerns to the client and urges the cli-

142. If a 4-3 decision resolving this issue had come down before the employee's refusal to act, however, this case becomes one of either unjustified employee insubordination or a bad faith request on the part of the employer.

143. It would also be a different case if Lowry had been asked to challenge the attorney general's interpretation in court rather than by violating it because MODEL CODE DR 7-102(A)(2) permits good faith arguments for modification or reversal of existing law.

144. There is some precedent for this standard in the public employment sector. In Heng v. Foster, 63 Ill. App. 3d 30, 379 N.E.2d 688 (1978), for example, a public sector nurse was reinstated after being discharged for refusing to report a theft committed by a fellow employee which she learned of while counselling him in a therapy session. The court found that the nurse's belief that disclosure was barred by federal patient confidentiality guidelines was reasonable, and that it was unnecessary to determine the actual scope of the guidelines. *Accord* Parrish v. Civil Serv. Comm., 66 Cal. 2d 260, 425 P.2d 233, 57 Cal. Rptr. 623 (1967).

145. *See* MORGAN & ROTUNDA, *supra* note 119, at 28 (discussing regulation of the legal profession).

ent to rectify the fraud. When the client refuses to do so, the firm withdraws on the grounds that continuing the representation would involve the firm in assisting the client to commit a fraudulent act.[146]

The associate, however, wishes to go further. As the lawyer who handled most of the contact with the other party, the associate feels compelled to disclose the fraud pursuant to DR 7-102(B)(1).[147] The partner orders the associate not to do so because the partner believes that, absent disclosure of the privileged information, the non-privileged evidence discovered by the associate does not meet the rule's requirement of information "clearly establishing" the existence of the fraud.[148]

This hypothetical is typical of the situation in which the reasonable belief test is intended to operate. DR 7-102(B) is a mandatory section ("he shall reveal the fraud"). Thus, under the *Pierce* test, the associate does not have to defer to the partner's decision and, in fact, can be disciplined if he makes the wrong decision concerning his conflicting obligations under the Code.[149] Absent the associate's right to rely on the reasonableness of his interpretation of the Code, the partner might decide that the risks of being disciplined for failing to disclose the fraud are minimal, especially considering the infrequency with which disciplinary sanctions are imposed.[150] Once the associate is free from the constraint of having to stake his job on whether his employer has committed a violation,[151] the associate is in

---

146. MODEL CODE DR 7-102(A)(7) prohibits a lawyer from counseling or assisting a client in conduct that the lawyer knows to be illegal or fraudulent.

147. MODEL CODE DR 7-102(B) states that:

> A lawyer who receives information clearly establishing that:
>
> (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

148. If the roles in the hypothetical are reversed, with the partner desiring disclosure and the associate counseling to maintain confidentiality, a decision by the associate to refuse disclosure but to remain with the firm if the partner discloses the confidences is not an example of passing his moral dilemma onto someone else. The associate is merely forcing the other lawyer to bear the full disciplinary consequences of his decision on his own. In this case, the associate is not "passing the buck" anywhere else but where it should have stopped in the first place.

149. Unless the requirements of DR 7-102(B)(1) are satisfied, revealing the fraud to third parties would violate DR 4-101, which requires preservation of client confidences, assuming none of the exceptions in DR 4-101(C) apply.

150. *See* BUS. WK. *supra* note 36, at 76 (only two-tenths of one percent of lawyers in America are ever disciplined, and proceedings against large firms are almost unknown).

151. *See Discharge of Professional Employees, supra* note 37, at 173 (observing that most professional societies refrain from reprimands for anything less than unlawful activity, although noting that the legal profession appears to take its enforcement role more seriously than most).

an almost impartial position to evaluate the merits of the partner's resolution of the ethical conflict. If anything, the associate will favor the partner slightly, because the partner still has the power to control the associate's work assignments[152] and career progress.[153] In addition, the associate must consider the possibility that if the partner is right, the associate faces possible discipline.

In short, only in rare cases will the partner who has correctly resolved the issue be unable to persuade the associate. Even more rare will be the case in which a court, faced with facts in which the associate was wrong and had been counseled correctly by an experienced attorney, will find that the associate's mistaken interpretation of law was reasonable. In such a rare situation, the possibility of which is suggested by the *Lowry* case,[154] the reasonableness standard still serves to reward the practice of attorneys who take independent responsibility for the ethical integrity of their actions. Meanwhile, in the average case, the standard serves the profession well by ensuring that the vigorous discussion needed to correctly resolve these disputes will occur within the lawyer's office before the violation takes place.

B. Wrongful Discharge Under the Model Rules

In many respects, the perspective from which the Model Code views the legal profession dictates the application of the reasonable belief test. With very few exceptions, the Code was drafted on the assumption that lawyers practice law as individuals. In the few places where the Code acknowledges the existence of law firms,[155] such as in the provisions regarding firm advertising or conflicts of interest, it treats the firm as if it were a single lawyer. Thus, it is no surprise that the standard for determining the wrongfulness of a lawyer's discharge under the Code focuses on the reasonableness of an individual lawyer's belief. The Model Rules, on the other hand, evi-

152. One inherent weakness of the wrongful discharge cause of action is that there is always some level of employer retaliation which will go unremedied. *See* Note, *supra* note 22, at 830. In this context, the possibility of such retaliation is not an unmitigated evil.

153. While partnership decisions are still highly discretionary, see *Discharge of Professional Employees, supra* note 37, at 852, some recent inroads have been made into even this bastion of absolute employer power. *See* Hishon v. King & Spaulding, 467 U.S. 69 (1984) (partnership decisions are subject to sex discrimination prohibition of Title VII).

154. In *Lowry* there was no determination as to the merits of the employer's interpretation of the rules, and, in fact, it appears that the court treated the employer's argument with skepticism. *See Lowry*, 102 Wash. 2d at 67, 684 P.2d at 682.

155. *See, e.g.*, MODEL CODE DR 2-101, DR 2-105 (regulating legal advertising), DR 4-101(D) (protecting confidences of a firm's clients), DR 5-101 - 5-107 (avoiding conflicts of interest).

dence a much greater awareness of the different contexts in which lawyers provide services.[156] Perhaps as a result of this different perspective, the wrongful discharge standard most compatible with the provisions of the Model Rules focuses on the reasonableness of the legal employer's representations rather than the legal employee's beliefs.

This different focus under the Model Rules results primarily from Model Rules 5.1 and 5.2,[157] which govern the relations between supervising and subordinate lawyers. These two provisions have no counterpart in the Model Code.[158] Rule 5.1 imposes on a supervisory lawyer (including a law firm partner) the duty to take reasonable steps to ensure that the conduct of lawyers under his supervision conforms to the Model Rules. Rule 5.2(a) imposes upon subordinate lawyers a duty to uphold the Model Rules even if instructed not to do so by their employer.[159] These two provisions, standing alone, amount to an explicit statement of the policies that jurisdictions must implicitly derive in order to justify the reasonable belief test. The Model Rules, however, make two additional observations. They explicitly recognize that good faith doubts can exist as to the application of a Rule to particular facts, and they anticipate that sometimes supervisory and subordinate lawyers, who share responsibility for a particular action, will reach conflicting good faith conclusions as to the requirements of professional conduct.

The Model Rules response to this situation is Rule 5.2(b), which provides that "[a] subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."[160] This provision proscribes the application of the reasonable belief standard in Model Rule jurisdictions. The premise of the reasonable belief standard is that since a lawyer must bear the ultimate disciplinary responsibility for his actions under the Code, his employer should defer to the lawyer's reasonable interpretation of his professional obligations. Under Rule 5.2(b), however, the subordinate lawyer is confronted with no such dilemma; as long as his employer's resolution of an arguable question of professional conduct is reasonable, an employee does not have to choose between in-

156. *See, e.g.*, MODEL RULES Rule 1.13 (organization as client), Rule 5.1 (responsibilities of supervisory lawyer), Rule 5.2 (responsibilities of subordinate lawyer).

157. MODEL RULES Rule 5.1, Rule 5.2.

158. *See* HAZARD & HODES, *supra* note 12, at 451.

159. MODEL RULES Rule 5.2(a).

160. MODEL RULES Rule 5.2(b).

subordinate behavior and potential exposure to disciplinary action. This exculpatory provision changes the nature of inquiry in wrongful discharge actions under the Model Rules.

Model Rule 5.2(b) makes the decision to follow one of two reasonable but conflicting ethical questions a legitimate exercise of a legal employer's right to supervise his employees. Analytically, this places a subordinate lawyer, confronted with an arguable question of professional ethics under the Rules, in a position similar to that of a subordinate lawyer who is ordered to file a motion which, albeit nonfrivolous, is highly unlikely to be granted.[161] Although both subordinate lawyers might feel that the request is not in the best interest of the legal system, or even of the client, neither one faces the dilemma of choosing between possible discharge and possible disciplinary action. Refusal to comply with the superior's request, however, undermines the legitimate expectation of the superior who should be able to rely on the fact that his employees will comply with his decisions on trial strategy or reasonable resolutions of arguable ethical questions.[162] In these situations, the employees' objections are based on individual preferences rather than professional ethics and are thus unprotected under the second part of the *Pierce* test.

One could interpret this Rules provision standing by itself as not passing the first part of the *Pierce* test because it appears to benefit the individual lawyer rather than the public.[163] This interpretation, however, would appear to be too restrictive a reading of the protection of public policy provided by the Model Rules. The drafters of the Model Rules made a principled decision that, since good faith doubts about the Model Rules' requirements are inevitable,[164] it would be in the public's best interest to provide a safe harbor for subordinate lawyers in situations where reasonable minds differ as to the meaning of a rule, considering the facts that the supervisory lawyer usually has more experience in making ethical judgments[165] and

161. *See supra* notes 98-100 and accompanying text (arguing that the exercise of discretion under the non-mandatory provisions of the MODEL CODE is within the scope of the employer's supervisory power).

162. *See supra* note 99 and accompanying text. *See also Pierce*, 84 N.J. at 73, 417 A.2d at 512 ("employers will know that unless they act contrary to public policy, they may discharge employees at will for any reason.").

163. *See Pierce*, 84 N.J. at 72, 417 A.2d at 512 (a code of ethics designed to serve only the interests of the profession does not qualify as a clear mandate of public policy). *See also Warthen*, 199 N.J. Super. at 27, 488 A.2d at 233 (describing one such self-serving professional code).

164. *See* HAZARD & HODES, *supra* note 12, at 461.

165. *See* Schneyer, *supra* note 18, at 18 (arguing against the establishment of a wrong-

that uncertainty concerning the relative responsibilities of the two lawyers could have a chilling effect on zealous representation.[166] The drafters thus made a rational presumption in favor of the supervisory lawyer's resolution of ethical disputes. However, the rule has the same effect as the reasonable belief test in that it forces the lawyers involved into a full discussion of the ethical consequences of the proposed action and places on the employer alone the discretionary risks involved in adopting his resolution of an ethical question.[167]

Although the Model Rules give the supervisory lawyer the right to direct a subordinate to follow one of two reasonable but conflicting ethical positions, this right is predicated on the supervisory lawyer first providing the associate with a timely explanation of the reasonableness of this resolution.[168] The subordinate lawyer is still subject to discipline under Rule 5.2(a) unless the supervisor's position is reasonable. Therefore, it would be patently unfair to allow an employer to discharge a subordinate lawyer who refused to obey a bald order of questionable ethics and then to permit the employer to escape liability by providing a full reasoned defense of his position at trial. Under the scheme established by Rule 5.2, the subordinate lawyer serves as guardian of the public interest by ensuring that the superior's order is reasonably consistent with the requirements of the Model Rules before complying with the request.[169] In order to carry out this function, the subordinate needs to have the arguments supporting the ethical validity of the action before him when he makes his decision whether or not to perform the act. Moreover, establishing the reasonableness of the request is crucial for the subordinate to establish his own defense to a charge of unethical behavior.

While in some cases the Code and Model Rules will yield different results, most cases would come out the same under either standard. Consider, for example, how a case similar to *Lowry* would be decided under the Model Rules' reasonable explanation test. Assum-

---

ful discharge cause of action for discharges arising out of good faith mistakes on the part of law firm partners as to the requirements of legal ethics).

166. *See id.* at 13 (noting that one consequence of a wrongful discharge action would be that supervisory lawyers might temper the zealousness of their representation in order to avoid possible lawsuits by dissenting employees).

167. *See supra* note 148 (arguing that it would not be improper in cases where reasonable doubts exist for a subordinate lawyer to refuse to perform a certain act yet remain in the firm if the supervisory lawyer himself performs the act).

168. *See* Mounts, *supra* note 99, at 531 (discussing the MODEL RULES provisions concerning supervisory and subordinate lawyers).

169. This places on the subordinate lawyer the responsibility of determining the reasonableness of his employer's action. In some ways, this provision is superior to the reasonable belief standard under the CODE, since it is more likely that a subordinate lawyer will be more objective in evaluating his employer's position than he would be of his own.

ing that Lowry's employer merely said "we are going to continue to allow lay representation until the attorney general stops us," this would not appear to be a reasonable resolution of the question. Because the subordinate lawyer could not rely on this unreasonable statement in a subsequent disciplinary hearing on the lay representation issue,[170] he would be protected from discharge for refusing to comply with his employer's request. As discussed previously, a lawyer in a similar situation in a Code jurisdiction could establish a reasonable belief that the employer's request amounted to a violation of the Code.[171]

In theory, at least, a difference in results is possible if the employer provided a reasonable justification for allowing lay representation.[172] While the reasonableness of the employer's explanation would remove a Model Rules lawyer's protection from discharge (but concomitantly protect him from discipline), a Model Code lawyer would still be protected provided that nothing in the employer's explanation exposes the subordinate's position as unreasonable. As has been discussed earlier, however,[173] the cases are rare in which a subordinate lawyer will risk employer sanctions and possible discipline to stand by his interpretation of the Code when the employer has proposed a reasonable counterinterpretation.

The one objectionable consequence of the reasonable explanation standard is that it permits the discharge of a lawyer who refuses to act because he reasonably believes the requested action will violate the Model Rules even though his employer has provided a reasonable alternate resolution of the ethical dispute. This would be true even if the employer's position was later found to be incorrect. This is disturbing, because it denies an employee safe harbor in the legality of his own actions. Closer inspection, however, reveals that the reasonable explanation standard provides the most rational result given the policies underlying the provisions of the Model Rules governing supervisory and subordinate lawyers.[174] The Model Code fo-

170. *See* MODEL RULES Rule 5.5 (prohibiting assisting others in the unauthorized practice of law).

171. *See supra* note 144 and accompanying text (discussing a hypothetical variation on the facts of *Lowry*, 102 Wash. 2d 58, 684 P.2d 678 (1984)).

172. *See supra* note 125 (discussing reasons why such representation may in fact be permissible in some circumstances).

173. *See supra* text accompanying note 154.

174. Although a full discussion of the issue is beyond the scope of this Article, it should be remembered that some states have private sector employee whistleblower provisions, *see* H. HOLLOWAY & M. LEECH, EMPLOYER TERMINATION, RIGHTS AND REMEDIES 292-96 (1985), which might affect the standards discussed in this Article. At least two states provide statutory protection to private sector employees who refuse to perform an act they reasonably believe to

cuses on how an individual lawyer's actions will affect the public interest, and provides a subordinate lawyer with the right to rely on the reasonableness of his belief. The Model Rules, on the other hand, while not freeing a lawyer of all responsibility for his professional conduct, recognize that there are public policy benefits to group resolution of ethical problems which also must be considered.

In the end, a wrongful discharge action under both the Code and the Rules recognizes a link between protection from discharge and disciplinary responsibility for incorrect resolution of an ethical question. Under the Code's reasonable belief standard, the subordinate lawyer is protected from discharge if he is mistaken, but he must suffer the disciplinary consequences of an incorrect determination. The Code assumes that a supervisory lawyer who is correct will usually be able to persuade his employee to agree with him, thus averting any possible harm to the public caused by a dissenting employee's Code violation. Under the Model Rules, however, the reasonable explanation standard defers to the employer's decision, which in many cases will be a collective decision made after consultation with other lawyers in the firm or on the in-house counsel staff. This standard is based on the implicit assumption that the collective decision, provided it meets the standard of reasonableness, usually will be correct. The shift in decision making authority from the individual to the group parallels a reallocation of disciplinary responsibility to the employer unless the employer can prove that the proposed action reasonably can be found consistent with public policy as defined by the Model Rules. Both standards in the end require discussion between the attorneys involved and depend on the subordinate lawyer's self-interest in avoiding discipline as a safeguard to protect public policy. They merely differ on defining whose risk of error, the supervisor's or the subordinate's, society would prefer to bear.

V. Conclusion

This Article has argued that there are contexts in which a wrongful discharge cause of action in the legal employment setting would serve the purpose of furthering professional ethics and, in isolated circumstances, would protect subordinate lawyers from economic coercion by unethical employers. It has also been demon-

---

be a violation of a law, rule, or regulation, and one state, (New Jersey), even extends this to incompatibility with a clear mandate of public policy. *See* N.J. STAT. ANN. § 34:19-3 (West Supp. 1986), N.Y. LABOR LAW Art. 20-C, § 740(1)-(7) (McKinney 1984).

strated that such a cause of action would be consistent with existing wrongful discharge law, as well as the Code and Model Rules. While a wrongful discharge action might one day provide justice for a subordinate lawyer put out of work for upholding the ethical standards of the legal profession, it would be preferable if such a claim never had to be brought. The true goal of the proposed cause of action is to encourage, and in some cases force, the lawyers involved to confer with each other in order to most accurately determine the requirements of legal ethics. In effect, the subordinate lawyer is protected in order to free him to protect the interests of the public. In cases where his professional protection has broken down and a lawsuit has resulted, the standards proposed in this Article have served only half their purpose.